No. 76-996

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. Its opinion in a prior appeal in this case (Pet. App. B) is reported at 511 F. 2d 953.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1976 (Pet. App. C). On December 9, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 18, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether travel in interstate commerce with intent to bribe an officer of a federally-insured bank, and the bribery of such officer, is a violation of the Travel Act, 18 U.S.C. 1952.

2. Whether the district court's *voir dire* of prospective jurors as to the effects of pretrial publicity was sufficient and whether petitioner waived any objection to such *voir dire*.

STATUTES INVOLVED

18 U.S.C. 1952 provides in relevant part:

> *Interstate and foreign travel or transportation in aid of racketeering enterprises.*
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * * *

18 U.S.C. 215 provides in relevant part:

> *Receipt of commissions or gifts for procuring loans.*
>
> Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation * * * except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

New York Penal Law §180.00 (McKinney 1975) provides:

> *Commercial bribing.*
>
> A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.
>
> Commercial bribing is a class B misdemeanor.

STATEMENT

In 1974 petitioner was convicted by a jury in the United States District Court for the Eastern District of Virginia of one count of conspiracy and two substantive counts of violating the Travel Act, 18 U.S.C. 1952, by travelling from

Virginia to New York with the intent to bribe an officer of a federally-insured bank in violation of 18 U.S.C. 215 and New York Penal Law §180.00 (McKinney 1975).[1] The district court granted his motion for arrest of judgment on the ground that violations of 18 U.S.C. 215 and New York Penal Law §180.00 were not "unlawful activity" within the meaning of the Travel Act. On the government's appeal, the court of appeals reversed (Pet. App. B; 511 F. 2d 953),[2] and this Court denied certiorari, 423 U.S. 874.[3] On remand, petitioner was sentenced to three concurrent three-year terms of imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioner was the head of a multi-corporate enterprise engaged in building and operating office and apartment buildings in Northern Virginia and the District of Columbia (396a-402a).[4] Beginning in 1965, and continuing into 1972, petitioner's organization obtained construction loans in excess of 93 million dollars

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[1]Petitioner, his two brothers Peter and Paul, and his attorney Charles J. Piluso had been indicted on eight substantive counts of violating the Travel Act, in addition to the conspiracy count. The court required that the government proceed on its strongest three counts, and six of the substantive counts were severed and subsequently dismissed. Petitioner was tried separately because he had been hospitalized when his co-defendants were tried. At the first trial, the charges against Peter Pomponio were dismissed by the court, Paul Pomponio was acquitted by a jury and Piluso was convicted on all three counts.

[2]The government's appeal was consolidated with Piluso's appeal from his conviction (see note 1, *supra*). Piluso, like petitioner, argued that an intent to violate 18 U.S.C. 215 and New York Penal Law §180.00 could not form the basis of a Travel Act conviction. Piluso's conviction was affirmed.

[3]Piluso's petition for certiorari was also denied, 423 U.S. 874.

[4]All references are to the two-volume joint appendix filed in the court of appeals, a copy of which we are lodging with the Court.

through the Royal National Bank in New York City (403a-404a).

Sidney M. Zneimer was senior vice-president of the Bank and his primary responsibilities involved construction and real estate loans (260a-262a). His duties included reviewing construction loan applications (265a-266a) and processing requests for disbursements on the basis of work completed (271a). Advances were to be made only upon verification of construction progress by bank inspectors (270a).

As discussed below, petitioner and his associates gave Zneimer cash and gifts (including two automobiles) worth more than $320,000.[5] In return for these payments, Zneimer helped petitioner obtain construction loans, authorized advances which were not based upon the approval of bank inspectors, and approved substantial overdrafts on accounts maintained by petitioner's organization (272a-281a).

ARGUMENT

1. Petitioner's principal arguments are essentially the same as those in his prior petition for certiorari, which this Court denied last Term. The only significant development since the denial of that petition is that the Second Circuit has disagreed with the Fourth Circuit over whether the Travel Act's prohibition of interstate travel to commit "bribery" includes New York's crime of commercial bribery. See *United States* v. *Brecht*, 540 F. 2d 45 (C.A. 2). There is no occasion for this Court to resolve that conflict here, however, because unlike in *Brecht*, the petitioner's

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[5]A breakdown of payments to or for the benefit of Zneimer is contained in government exhibit 43 (467a-471a). Many of the payments were made to Real Equity Consultants, Inc., a corporation set up for Zneimer by co-conspirator Piluso for the purpose of receiving money from petitioner's organization (287a-290a).

conviction under the Travel Act was predicated not only on the New York statute but also upon 18 U.S.C. 215.

Under 18 U.S.C. 215, it is a crime for an officer, director or employee of a federally-insured bank, except as provided by law, to receive any "fee, commission, gift, or thing of value" from any person, firm or corporation in exchange for procuring or attempting to procure a loan for the donor, or for anyone else. Zneimer was an officer of a federally-insured bank (260a-261a) and personally received in his New York office more than $320,000 from petitioner (281a-283a, 286a-287a). Zneimer testified that he made unauthorized advances to the Pomponios of up to "a million or more dollars at any one particular time" (275a-276a) and covered unusually large overdrafts on the account of petitioner's firm (279a-280a). Zneimer admitted that "the amount of money that [petitioner and his associates] had given me must have influenced me to assist them far beyond what normally I would have done if I had never had that kind of a relation with them" (281a). He pleaded guilty to a federal indictment in connection with the payments (284a).

Petitioner thus made payments whose receipt by Zneimer violated 18 U.S.C. 215 whether or not petitioner himself violated the New York commercial bribery law by making the payments. Petitioner's travel in interstate commerce to make those payments was travel to "promote, manage, establish, carry on" or to "facilitate the promotion, management, establishment, or carrying on" of a bribery which violated 18 U.S.C. 215.[6]

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[6]Each count of the indictment (3a-27a) charged petitioner with travel with intent to promote bribery in violation of both 18 U.S.C. 215 and New York Penal Law §180.00. The court instructed the jury that "[t]raveling in interstate commerce or use of facilities in interstate commerce in furtherance of an unlawful activity, either the violation of the banking law or the violation of the State of New York, is an essential element of the offense" (454a). The evidence could not reasonably be viewed as showing an intent to violate the New York statute but not the federal. Either petitioner intended to make improper payments to Zneimer or he did not. The jury found that he did, and it necessarily follows that an intent to promote a bribery in violation of the federal statute was established.

Petitioner's answer is that 18 U.S.C. 215 itself is a "commercial bribery" statute and thus not covered by the Travel Act (Pet. 12). Petitioner can draw no support for this contention from *Brecht*, which did not involve Section 215,[7] and indeed petitioner cites no authority for his construction of the statute. In any event, Section 215 is not a commercial bribery statute, as this Court recognized in *United States* v. *Nardello*, 393 U.S. 286, 293 n. 11 (emphasis added): "Bribery has traditionally focused upon corrupt activities by *public* officials. See 18 U.S.C. §§201-218 * * *." Furthermore, since Congress by Section 215 has prohibited the acceptance of a bribe by an officer of a federally-insured bank, it must have intended to include such bribes when in the Travel Act it proscribed interstate travel to facilitate the promotion of "bribery * * * in violation of the laws * * * of the United States."

Alternatively, petitioner argues (Pet. 12), it is "illogical" to construe the Travel Act so as to subject a defendant to its felony sanctions where the underlying offense is only a misdemeanor. This construction of the Travel Act, however, has consistently been upheld by the courts of appeals. See, *e.g.*, *United States* v. *Karigiannis*, 430 F. 2d 148, 150 (C.A. 7), certiorari denied *sub nom. Panagiotopoulos* v. *United States*, 400 U.S. 904; *United States* v. *Polizzi*, 500 F. 2d 856, 873 n. 17 (C.A. 9), certiorari

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[7]The official demanding a bribe in *Brecht* was an employee of the Westinghouse Electric Corporation and thus could not be charged under 18 U.S.C. 215.

denied, 419 U.S. 1120; *United States* v. *Garramone*, 380 F. Supp. 590, 593 (E.D. Pa.), affirmed, 506 F. 2d 1053 (C.A. 3), certiorari denied, 420 U.S. 992.

2. Petitioner contends (Pet. 15-23) that the *voir dire* examination of prospective jurors was inadequate to insure that the jury was not influenced by pretrial publicity concerning petitioner, his brothers, and their business.

At the outset of the selection procedure, the district court asked the panel of veniremen whether any of them had read or heard anything about petitioner and his brothers. Each venireman who responded affirmatively was asked whether he would be able to render a fair and impartial verdict. Seven veniremen who indicated that they might not be able to be impartial were excused (See 236a-243a).[8]

This Court has recently reaffirmed the traditional view that the scope and content of *voir dire* examination are committed to the sound discretion of the trial court. *Ristaino* v. *Ross*, 424 U.S. 589, 594-595. Although petitioner and his brothers had been the subject of newspaper publicity in Northern Virginia (30a-163a), a reading of the newspaper articles shows that they were, as a whole, factual and impartial. There were no highly inflammatory articles, nor were there editorials proclaiming petitioner's guilt. Compare *Sheppard* v. *Maxwell*, 384 U.S. 333; *Silverthorne* v. *United States*, 400 F. 2d 627 (C.A. 9). Indeed, as the court of appeals noted (Pet. App. A 2a), less than a month before petitioner's trial began, his brother Paul was acquitted by a jury on the same charges for which petitioner was tried.[9] In these circumstances the court of

[8]Petitioner's argument (Pet. 21-22) that individual veniremen are reluctant to acknowledge being influenced by publicity unless questioned in isolation thus rings hollow here.

[9]Less than a week prior to trial petitioner himself was acquitted by a jury of tax evasion (163a).

appeals properly concluded that the district court's refusal to ask the questions petitioner proposed was not error.

Moreover, as the court of appeals observed, petitioner declined to follow through on his request. Petitioner proposed 37 *voir dire* questions (219a-226a), of which two concerned pretrial publicity. The district court stated "I will ask some of [the 37 proposed questions] and some of them I won't, but you can approach the Bench after I finish and put on the record your objections to my failure to ask any you think I should have asked" (230a). During *voir dire*, the court referred to the publicity, asked the venire if any of them would possibly be influenced by such publicity, and excused those who answered affirmatively. The court then asked petitioner's counsel if there were additional questions he wished to have the court ask (246a). Counsel requested that the court ask certain of the questions, which counsel referred to by number, that petitioner had earlier submitted, unrelated to publicity (246a-247a). The court complied with petitioner's request, and asked each of the questions (249a-250a).

Petitioner did not request that the questions concerning publicity be read, nor did he indicate any dissatisfaction with the court's questions concerning publicity, either while those questions were being asked or when specifically given the opportunity to do so later. Petitioner's trial counsel apparently was satisfied with the court's questions regarding publicity and he waived any objection to them by failing to refer to those questions when he asked the court to ask others—which the court did.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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